IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

I.T.A. No. 273 of 2006

DATE OF DECISION: 20.9.2007

The Commissioner of Income-tax, Panchkula

…Appellant

Versus

M/s Haryana State Co-operative Supply & Marketing Federation Limited.

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Yogesh Putney, Advocate,
for the appellant-revenue.

Mr. M.L. Garg, Advocate,
for the respondent-assessee.

M.M. KUMAR, J.

This is revenue's appeal under Section 260A of the Income-tax Act, 1961 (for brevity, 'the Act'), against order dated 3.11.2004, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh (for brevity, 'the Tribunal), in I.T.A. No. 617/Chandi/2000, in respect of assessment year 1991-92. The revenue has claimed that the following substantial questions of law would arise for determination of this Court:-

(i) Whether in the facts and circumstances of the case, the ITAT was right in law in upholding the

order of the CIT (A) for considering the assessee's claim of increased depreciation at the stage of re-assessment proceedings while the same had not been claimed originally?

(ii) Whether in the facts and circumstances of the case, the ITAT was right in upholding the order of the CIT (A) in deleting the interest charged under Section 234B of the Income-tax Act, 1961, by observing that the assessee was not liable to pay advance tax and interest under Section 234B, when the levy of interest under Section 234B is mandatory?

We have heard learned counsel for the parties and perused the record with their able assistance.

After hearing learned counsel it has emerged that second question stands already answered by a Division Bench of this Court in the case of **Commissioner of Income-tax, Panchkula v. M/s Haryana Warehousing Corporation (I.T.A. No. 242 of 2006, decided on 20.4.2007)**, by rejecting the submission of the revenue. The Division Bench observed as under:-

" Section 210 of the Act provides for payment of advance tax by a person who is liable to pay advance tax. In the instant case, when the Assessing Officer had himself assessed the income originally at 'nil', the assessee was not liable to pay advance tax. Interest

under Section 234B and 234C of the Act can be charged only if there is any failure on the part of the assessee to pay advance tax. ……"

The Division Bench further went on to observe as under:-

" If the assessee fails to pay advance tax which he is liable to pay, then charging of interest under Section 234B of the Act is mandatory, but in the present case, the provisions of Section 234B of the Act cannot be invoked.

It may also be noted that admittedly upto the assessment year 1991-92, the assessee did get the benefit of Section 10(29) of the Act. It was assessed on 'nil income. The exemption was granted on the basis of Allahabad High Court decision in Commissioner of Income-tax v. U.P. State Warehousing Corporation, (1992) 195 I.T.R. 273 (All.). As no other decision was brought to the notice, therefore, the Revenue accepted the said decision. The assessee acted bonafide in conformity with the decision of the High Court, just because the decision was reversed by the Apex Court, liability to pay advance tax cannot be fastened on the assessee. At the relevant point of time, it was not possible for the assessee to foresee the decision of the Supreme Court on the point "*Lex non go co git ad*

> *impossibilla*" (Law cannot compel you to do the impossible). Before invoking Section 234B of the Act, it is essential to see whether the assessee comes within the sweep of this section. The pre-condition for invoking Section 234B of the Act is that the assessee must be fastened with the liability to pay advance tax. As the assessee was not liable to make the payment of advance tax, the case of the assessee would not come within the ambit of Section 234B of the Act."

Accordingly, question No. (ii) is answered against the revenue in terms of Division Bench judgment of this Court rendered in the case of M/s Haryana Warehousing Corporation (supra).

In so far as first question is concerned relating to depreciation, the revenue has filed an appeal against the order dated 17.5.2004, passed by the CIT (A), Panchkula, in respect of the same assessment year. The Tribunal upheld the order of the CIT (A) by placing reliance on a judgment of Hon'ble the Supreme Court in the case of **CIT v. Sun Engineering Works Pvt. Ltd., (1992) 198 ITR 297,** and held that a matter which has not been agitated in the concluded original assessment proceedings cannot be permitted to be agitated in the re-assessment proceedings unless it is relatable to the item sought to be taxed as escaped income. The CIT (A) had further pointed out that in the case of the assessee, the entire income was claimed to be exempted and the claim with regard to depreciation was not even looked into by the revenue. Accordingly, exemption was

granted to the assessee. However, when the proceedings were re-opened, the CIT (A) has opined that the revenue was bound to consider the permissible deduction against the income which is sought to be assessed under Section 147 of the Act. The Tribunal upheld the view in its order dated 9.8.2005, which is taken on record as Mark 'A'. We asked Mr. Yogesh Putney as to whether any appeal has been preferred by the revenue against the aforementioned order. In response to the query made by us, Mr. Putney has placed on record a letter dated 23.8.2007, sent by the department stating that no such appeal has been filed as per the record. The aforementioned letter is taken on record as Mark 'B'.

In view of above, question No. (i) is also answered against the revenue.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

September 20, 2007
Pkapoor